Deputy Registrar who was merely performing an administrative function in the judicial process. The application before the learned judge was not only groundless but also unprecedented. Accordingly, we would dismiss the appeal.

Appeal dismissed.

Solicitors: *Marina Yusoff & Co.*

RE HAJI MOHAMED EUSOFF, DECD. KOK SU WIN v. NG KOON MEE

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Salleh Abas F.JJ.) January 27 & March 3, 1981]

[Ipoh — Federal Court Civil Appeal No. 246 of 1980]

Probate and Administration — Receiver of estate appointed by court — Application for leave to begin proceedings against receiver — No binding agreement — Leave refused.

Practice and Procedure — Application for leave to begin proceedings against receiver of estate — Leave refused.

In this case the appellant as executrix of the estate of her late husband, Ling Liong Chin, applied for liberty to begin proceedings against the receiver of the estate of Haji Mohamed Eusoff bin Mohamed Yusoff for specific performance of an alleged agreement based on an offer to sell two pieces of land belonging to the estate made by the receiver and the administrators to her late husband and accepted by him. Leave was refused in the High Court and the appellant appealed.

Held: the appellant had not shown that there was a valid and binding agreement of sale entered into as alleged by her and the learned judge was correct in holding that this was not a proper case for the grant of leave.

Case referred to:-

(1) *Degroot* v. *Jay* 30 Barb. (N.Y.) 483.

FEDERAL COURT

S. Jeyapalan for the appellant.

M. Sivalingam (*N. Selvarajah* with him) for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The originating summons, in which the application has been made, is an action by the beneficiaries of the estate of Haji Mohamed Eusoff bin Mohamed Yusoff. Of the estate Ng Koon Mee the respondent was appointed receiver on July 22, 1968 by an order of court.

The appellant as the executrix of the estate of her late husband, Ling Liong Chin, (Ling) applied by summons-in-chambers in the action for liberty to begin proceedings against the receiver for specific performance of an alleged agreement to sell two pieces of land belonging to the estate made by the receiver and the administrators to her husband and accepted by him.

While there appears to be no statutory provision which requires a party to obtain the leave of the court to sue a receiver,

"the receiver is the officer of the court, and, by the well settled practice, permission of the court was necessary to warrant an action against him. The rule is intended for the protection of receivers against unnecessary and oppressive litigation, and should be carefully maintained. It is a contempt of the court to sue a receiver without such permission . . . ."

see *Degroot* v. *Jay*.[1] No point was however taken whether the leave to be obtained should be applied for in the same probate action.

If leave had been obtained, presumably the appellant will choose a convenient vehicle for her contemplated action for specific performance, but without the leave of court, she could not do anything. She failed to obtain this leave, and it is clear from the judgment of the High Court that the learned judge was not satisfied on the affidavit evidence and the evidence of the various documents exhibited thereto that there was such a valid and binding agreement of sale entered into as alleged by her.

Considerable difficulties lay in the path of the appellant. The agreement, if any, was reached by Ling. She could not speak from personal knowledge. She had to rely on the correspondence left behind by Ling and other documentary evidence. Quite a few matters are therefore seriously disputed between the parties.

But there can be no doubt about the intention to sell the lands. An order of court to sell the lands was obtained on April 14, 1965. By advertisement in the *New Straits Times* issue of December 11, 1974, pursuant to this order of court, the lands in question were offered for sale by tender, subject to certain terms and conditions, of which the most relevant are that the sale was subject to the approval of the court and the vendor/receiver reserved the right to withdraw any of the lands for sale before the same was actually sold, without declaring the reserve price. Clearly and beyond argument, the order of court specifying that the sale was to be by tender called for sufficient advertisement, receipt of tenders, opening of the letters of tender and the taking of a decision which tender to accept and to seek the approval of the court for.

We now turn to the appellant's affidavit for her version of the part played by Ling in the tender exercise. What she affirmed was:

"2. Towards the end of 1974 Ng Koon Mee, the receiver, and Ahmad Nazri bin Haji Mohamed Eusoff and Fatimah binti Haji Mohamed Eusoff, the administrators of the estate of Haji Mohamed Eusoff bin Mohamed Yusoff, offered to sell to my late husband the lands held under C.T. 19815 for Lot No. 2923S and C.T. 19806 for Lot No. 2914S Town of Ipoh (hereinafter called the said lands) for the sum of $200,000/- and my late husband accepted the offer.

3. By letter dated January 3, 1975 M/s. Lim Kean Chye & Co. solicitors for the said receiver and the said administrators, demanded payment of the deposit for the sale of the said lands and on January 6, 1975 M/s. Gill & Co. solicitors for my late husband forwarded $20,000 being the deposit to M/s. Lim Kean Chye & Co. On January 7, 1975 an emergency meeting was held at the office of M/s. Lim Kean Chye & Co. when the various offers for the said lands were considered and it was decided that the offer made by my late husband be accepted.

4. On June 10, 1975 M/s. Lim Kean Chye & Co. returned the cheque to M/s. Gibb & Co. stating that the Administrators and Receiver had decided not to accept the offer and forwarded the cheque for $20,000. My late husband refused to accept the return of the deposit and M/s. Gibb & Co. sent the cheque for $20,000 back to M/s. Lim Kean Chye & Co. All attempts by my late husband and later by me to get the respondents to abide by the agreement of sale has (sic) not been fruitful."

There would appear to be an inconsistency between the first two of these paragraphs. Was there an offer to sell and the acceptance of that offer by Ling towards the end of 1974, or was it the case that in consequence of an invitation made in 1974, Ling put in an offer to buy and his offer was accepted early in 1975? And it has to be remarked that nowhere was there any allegation that Ling had tendered for the lands in question or that his tender had been accepted. The claim thus formulated was therefore a sale by private treaty, either in accordance with paragraph 2 or with paragraph 3. The demand for the deposit was advanced as evidence and proof of the offer or acceptance of the offer, the payment as proof of the sealing of the bargain. As for this, the receiver countered by referring to the minutes of a meeting held on December 30, 1974, and attended by Mr. Balasingam of Gibb & Co. solicitors for the beneficiaries (and incidentally the then solicitors for Ling), Cheang Lee & Ong, solicitors for one of the administrators and Lim Kean Chye & Co., solicitors for the administrators (there would appear to be a double representation for one of the administrators) and for the receiver.

At this meeting, according to the minutes taken at that time, Mr. Balasingam as solicitors for the beneficiaries complained of the inadequacy of the tender notice and he also advised that he had a client who was prepared to offer $200,000 for the said lands. Deductively, this client was Ling and Ling had not submitted any tender. The upshot of this meeting was to call for a re-tender. If the minutes correctly record what transpired, then contrary to what had been contended by the appellant, no tender had been accepted.

So far as the re-tender is concerned, it has not been made known to the court, probably by an oversight, that there was the usual requirement that each tender must be accompanied by a 10% deposit of the price offered as earnest of the tender. But it would appear to be so and the request made by Lim Kean Chye & Co. to Gibb & Co. for this deposit would seem to remedy an omission by Ling if in fact he had made a subsequent tender or if he had not, be proof of his solicitor's claim of his offer to buy rather than, as contended by the appellant, constitute proof of a concluded bargain.

What happened next was the calling of an urgent meeting for January 7, 1975. Notice of this meeting was given, among others, to Gibb & Co. definitely as solicitors for the beneficiaries and possibly as solicitors for Ling, though it would not appear to be likely so. The transactions at this meeting are a matter of grave dispute. It is the appellant's contention that at this meeting, Ling's tender or offer was accepted. The receiver denied this. Unfortunately no minutes of this meeting have been produced. The receiver however relied on two letters by his solicitors. The first was to Cheang Lee & Ong for one of the administrators advising that their client the other administrator was unwilling to sell and therefore they were unable to apply to court for the necessary approval. The second was written some 5 months afterwards to Gibb & Co. advising the rejection of Ling's offer; Ling having died in the meantime, the letter was to the solicitors for the appellant.

We think it is reasonably clear that the receiver and his solicitors favoured the offer of Ling but were unable to proceed further in the matter in view of lack of consent of Fatimah, one of the administrators. According to the receiver, she was not present at this meeting of January 7 and subsequent efforts to obtain her consent were unfruitful.

It is basic law that a contract is formulated by offer and acceptance and not by intention. If what the receiver contended was the truth, then clearly no contract had crystallised in January 1975.

We consider that the proper approach of the court to an application for leave to start an action against the receiver is for the court to consider not the certainty of success of the contemplated action but the likelihood of success. If the applicant can show on a balance of probabilities that she has a reasonable cause of action, she should be given leave. Where facts are in dispute, as almost invariably they will be, it may be that a trial should be allowed to test the veracity of the allegations, but where the truth or otherwise of these allegations can be tested against the surrounding circumstances of the case, the court should then embark on such an exercise, before it decides to give leave or refuse it.

The appellant had not shown her reactions to the rejection of her husband's offer communicated to her solicitors on June 10, 1975. While every allowance must be made to her for her recent bereavement, the fact remains that she did not make her move to apply for leave until June 12, 1980, a full five years later. She has failed at all times to obtain any affidavit from Mr. Balasingam, her then solicitor, who was present at the meeting of January 7, 1975, to contradict the receiver and she has at no time advanced any reason or explanation why such an affidavit was not obtained. In these circumstances, the learned judge did not think that the appellant had any claim against the receiver.

But to our mind, the final word was said on her behalf by Mr. Colin Clark, a solicitor whom she appointed in place of Mr. Balasingam, in an affidavit filed subsequently by her present solicitors. If the information was confidential, the appellant has voluntarily removed the seal of confidentiality from what transpired in 1977. After Mr. Clark had lodged a caveat against the lands, the solicitors for the administrators and the receiver, forwarded him a draft agreement of sale of the said lands. In the words of Mr. Clark, "this draft agreement was forwarded under cover of a letter dated March 8, 1977 and marked 'without prejudice' .... I wish to say as regards negotiations relating to the draft agreement referred to in the letter of March 8, 1977 all negotiations were carried on a 'without prejudice' basis. The negotiations did not result in any agreement." The last sentence, especially, must put paid to any contention of a concluded agreement then or earlier.

At the appeal, counsel for the appellant pleaded for another opportunity to put more facts before the court. We do not know what these facts are or how relevant they are, but no explanation was ventured

why if they are relevant and would have determined the fate of the application in her favour, she had not produced them in the first place. With all respect, it will be going accepted practice to accede to the request, lacking the reasons for the application.

In all the circumstances of the case, we agree with the learned judge that this is not a proper case for the grant of leave. The appeal is according dismissed with costs.

Appeal dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Kean Chye & Silvalingam.*

TRIUMPHAL ENTERPRISES SDN. BHD. v. GAN HEAH SIEW

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Salleh Abas F.JJ.) August 8, 1980 & March 5, 1981]
[Kuala Lumpur — Federal Court Civil Appeal No. 25 of 1979]

Practice and Procedure — Application for specific performance of agreement relating to land — Exchange of property — Whether sale or purchase — R.S.C. 1957, O. 14A.

In this case one Gan Teng Seong since deceased and the appellant entered into an agreement whereby the deceased agreed to transfer a piece of land to the appellant for development purposes. In consideration of the transfer the appellant promised to build certain houses at his cost for the deceased. It appeared that no planning approval had been obtained for the development of the land after a lapse of nearly four years and the respondent sued as executor of the estate of the deceased for specific performance by the retransfer of the land to him. The learned trial judge on an application under Order 14A of the Rules of the Supreme Court, 1957 granted specific performance and the appellant appealed.

Held, allowing the appeal: as there was no monetary consideration for the transaction in this case it was not a sale or purchase within the meaning of Order 14A of the Rules of the Supreme Court, 1957, and summary judgment for specific performance could not be given under that order.

Case referred to:-

(1) *Robshaw Brothers Ltd.* v. *Mayer* [1957] Ch. 125.

FEDERAL COURT.

Joseph Loo for the appellant.

O.C. Lim for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): We allowed this appeal and stated we would give our reasons later. We do so now.

Respondent, Gan Heah Siew alias Gan Chong Ho was the son of deceased Gan Teng Seong who died on May 5, 1974. He was made an executor and as such he sued the appellant for the benefit of the estate.

On July 22, 1973 deceased and appellant entered into an agreement whereby deceased agreed to transfer a piece of land described as E.M.R. 341 Lot 755 in the Mukim of Mentakab in the District of Temerloh, Pahang to appellant for development purposes. In consideration of the transfer appellant promised to build for deceased three double storey shophouses, eleven terrace houses and six semi-detached houses. The entire costs for the construction of the buildings would be borne by appellant. The transfer was to be effected on the execution of the agreement. Under Clause 5 appellant was obliged to submit the lay-out plan to the State Planning or other relevant authority for approval within one month from the date of agreement. Under Clause 6(a) it is provided that in the event of planning approval being refused appellant agreed to re-transfer the land to deceased and the agreement shall cease to have any effect. Upon approval of the plan, appellant shall forthwith apply for conversion and sub-division of the land and for separate titles for each lot. Construction work shall commence three months after approval of the building plans. The agreement shall be binding on the personal representatives of deceased and successors-in-title and assigns of appellant. Deceased duly executed a valid and registrable transfer of the land in favour of appellant and registered it on November 10, 1973.

Respondent alleged that after a lapse of nearly four years no approval had been obtained. So, he claimed for specific performance by the re-transfer of land to him. He also claimed for (a) an order for appellant to bear the costs, fees and taxes in connection with the re-transfer of the land, (b) damages for breach of contract, (c) costs and (d) other reliefs. He claimed to have written several letters to appellant in 1974, 1975 and 1976 through his solicitors but received no answer. On January 25, 1977, his present solicitors wrote to appellant invoking the said Clause 6(a) and asked for re-transfer of the land. Again, there was no response from appellant. By a summons-in-chambers respondent applied for summary judgment under Order 14A rule 1 of the Rules of the Supreme Court, 1957 on the terms of the minutes of proposed judgment annexed. He alleged that the plan produced was prepared in March 1974, about eight months after the execution of the agreement.

Appellant denied that no lay-out plan was submitted. The explanation was given by Yan Sin Min in his affidavit dated November 29, 1978 in the following paragraphs: —

"4. It is not true that no layout plan was submitted by the defendant pursuant to the agreement dated 22nd July, 1973.

5. Before the said agreement was signed and before the land therein referred was transferred to the defendant the plaintiff's father, since deceased, had agreed to the arrangement and the terms as contained in the said agreement.

6. In anticipation of the said agreement and in pursuance of the said arrangement the said deceased did on 17th April, 1973 at the expense of the defendant submit the layout plan to the Town Council of Temerloh and Mentakab for approval. The said layout plan was prepared by Messrs. Lam & Yap, Part II Architects who were in fact employed by the defendant.

7. On 26th June, 1978 I was notified by Messrs. Lam & Yap that the said layout plan had been approved by the said Town Council. I now produce the letter from the said Town Council addressed to Messrs. Lam & Yap indicating approval of the said layout plan, the said letter is annexed hereto and marked as exhibit 'YSM 1'.

8. Having been so notified that the said layout plan had been approved I whereupon engaged Messrs. Syarikat Jurukur Malaysia a firm of surveyor to make an application on behalf of the defendant to the Pemungut Hasil Tanah, Temerloh for the conversion of land use and subdivision of the said land in terms of the approved lay-